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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 608

HERMETIC SEAL PRODUCTS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original order of the District Court for the District of Puerto Rico (App., *infra*, pp. 13–14)[1] is unreported, but its opinion on motion for reconsideration (App., *infra*, pp. 14–17) is reported at 198 F. Supp. 749. The original opinion of the Court of Appeals for the First Circuit (Pet. App. 11a–23a) is reported at 307 F. 2d 809. Its opinion on the motion for reconsideration in No. 5951 (Pet. App. 9a–10a) is not yet reported.

JURISDICTION

In two of the cases in the court below (Nos. 5952 and 5953) the judgments of the court of appeals were

[1] The opinions of the district court are set forth in an Appendix, *infra*, pp. 13–17, for the convenience of the Court.

entered on August 30, 1962 (Pet. App. 5a, 6a). In the third case (No. 5951), a judgment was also entered on August 30, 1962 (Pet. App. 4a), but upon timely motion for reconsideration it was vacated, and a new judgment was entered on November 13, 1962 (Pet. App. 7a, 8a). The petition for a writ of certiorari was filed on November 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below clearly erred in finding that the Renegotiation Board did not have notice or actual knowledge of petitioner's arrangement proceeding under Chapter XI of the Bankruptcy Act in time to afford it an opportunity equal to that of other creditors to participate in the proceeding and avail itself of the benefits of the Act.

2. Whether the alleged inapplicability of the Renegotiation Act to petitioner's defense subcontracts may be raised as a defense to a collection suit rather than in the Tax Court proceedings prescribed by the Act.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Bankruptcy Act, the Renegotiation Act and the Regulations of the Renegotiation Board are set forth in the appendix to the petition (Pet. App. 1a–3a).

STATEMENT

The basic facts were found by the court below and are undisputed here.

1. Petitioner was incorporated under the laws of Puerto Rico in 1951. At its plant in Puerto Rico it

engaged in the manufacture of hermetically sealed glass-metal components of electronic equipment (Pet. App. 13a). Raw materials and components were purchased primarily from suppliers on the mainland, and sales were primarily to electronic manufacturers there (Pet. App. 13a; R. 66).[2] Approximately 66 percent of its business was on defense subcontracts (Supp. R. 275–276). Although the capital investment in the corporation was small ($2,000), its profits were exceptionally high both absolutely ($607,000 in fiscal 1952 and $944,000 in 1953) and as a percentage of sales (42.7 percent in 1952 and 47.8 percent in 1953) (Supp. R. 275–276).

The Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. 1211–1224, establishes a procedure whereby the government may determine whether excessive profits have been obtained by contractors in connection with national defense programs and, if so, may recover them. Proceedings were instituted before the Renegotiation Board with respect to petitioner's profits for the fiscal years 1952 and 1953; however, because petitioner was late in filing the reports required by the Act, these proceedings did not formally commence until May 5, 1953, and July 1, 1954, respectively (Pet. App. 13a). Petitioner's representative, one Gutkin, asserted that the Act did not apply to contracts performed in Puerto Rico; the Board's renegotiator repeatedly asserted the Board's position that it did apply to such contracts (Pet. App. 13a–14a). When the negotiations foundered the

[2] The "Record Appendix to Briefs for Appellant" in the court below is cited as "R."; the "Supplemental Record Appendix to Brief for Appellee" is cited as "Supp. R."

parties in March and June 1956 agreed to an extension of the time within which agreements or determinations as to excessive profits for 1952 and 1953 might be made, to March 1, 1957, and July 1, 1957, respectively (Pet. App. 14a).

On August 8, 1956, petitioner and certain New Jersey affiliates filed a joint petition[3] in the District Court for the District of New Jersey for an arrangement under Chapter XI of the Bankruptcy Act, 52 Stat. 905, as amended, 11 U.S.C. 701–799. Pursuant to the petition the court immediately appointed a receiver, and creditors' meetings were held and committees appointed during August, September and October of 1956 (Pet. App. 14a). The government's renegotiation claims were not scheduled by petitioner, nor were they listed in its Statement of Affairs (Pet. App. 14a–15a). When the receiver inquired as to the possible existence of such claims, Gutkin assured him that the Renegotiation Board shared his view that there was no such liability (Supp. R. 77); accordingly, notices of the arrangement proceedings and creditors' meetings were not sent to the Board or its representatives (Pet. App. 15a). Moreover, Gutkin continued to represent petitioner in the renegotiation proceedings and never told the renegotiators of the Chapter XI proceedings (Pet. App. 14a).[4]

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[3] They asserted that, because of common stock ownership and identity of corporate officers and directors, they constituted one economic unit (Pet. App. 14a).

[4] A renegotiation debt of $12,000 to the Department of the Navy did appear on the books and records of one of petitioner's affiliates. By letter of October 10, the receiver had notified the Navy of the pendency of the arrangement proceeding, and a proof of claim was prepared and filed on November 8 (R. 83–84, 102–104, 114). See note 5, *infra*, p. 6.

On October 19, however, the renegotiators learned of the pendency of the Chapter XI proceedings from another source (Pet. App. 15a). After ascertaining from the clerk of the district court that no final date had been set for the filing of proofs of claims, the renegotiators notified the Board in Washington (*ibid.*). On October 23, the New York Regional Renegotiation Board issued a unilateral determination of $200,000 of excessive profits for fiscal 1952 and, on November 7, of $300,000 for fiscal 1953 (*ibid.*). Notices and copies of these orders were sent to petitioner in Puerto Rico, and to its president at his office in New York; although these notices were received, they were not brought to the attention of the receiver or his counsel, nor were they mentioned at the final formal meeting of creditors which was subsequently held (Pet. App. 15a–16a). On October 25 and November 2, respectively, the renegotiation proceedings were transferred to the Renegotiation Board in Washington for review, and on November 13, the Board requested the Department of Justice and the General Accounting Office to prepare and file contingent proofs of claim in the Chapter XI proceeding (Pet. App. 16a; Supp. R. 241).

Meanwhile, on November 9, 1956, the final meeting of creditors in the Chapter XI proceeding was held at which a plan of arrangement was agreed to, and it was confirmed by the district court on November 13 (Pet. App. 14a). From October 19 (when the renegotiators learned of the pendency of the Chapter XI proceeding) until after November 13, no employee or member of the Board had notice or actual knowledge

of the holding of the meeting, the adoption of the plan or its approval by the court (Pet. App. 15a, 16a). After the Board, on November 13, requested the Department of Justice to take necessary action, the Department, on November 15, instructed the United States Attorney to file a contingent claim; however, since the plan of arrangement had been adopted and judicially confirmed, these instructions came too late, and the United States Attorney so informed the Department (*ibid*).[5]

After postponements in the renegotiation proceedings at petitioner's request, the Board in March 1957 issued unilateral orders that petitioner had received excessive profits of $250,000 for fiscal 1952 and $400,000 for fiscal 1953 (Pet. App. 16a–17a). Petitioner filed a timely petition in the Tax Court pursuant to Section 108 of the Renegotiation Act, 65 Stat. 21, as amended, 50 U.S.C. App. 1218, for redetermination of the amount of excessive profits, and that action is still pending (Pet. App. 17a).

Because petitioner (contrary to the provisions of the Act) failed to file financial statements with respect to fiscal 1954 and 1955 until February 8, 1958, the Board was unable to determine the existence of excessive profits for these years until long after the termination of the Chapter XI arrangement proceed-

[5] The United States Attorney had received notice of the creditors' meeting on November 9 because of his representation of the Navy's $12,000 claim against one of petitioner's affiliates (R. 98) (see note 4, *supra*, p. 4). However, he did not know of the claims against petitioner until he received the instructions from the Department of Justice in November (Pet. App. 16a).

ing (Pet. App. 17a). On August 10, 1959, and December 21, 1959, the Board issued unilateral orders that petitioner had received excessive profits in the amount of $225,000 for fiscal 1954 and $100,000 for fiscal 1955, respectively (Pet. App. 17a–18a). Petitioner did not file Tax Court petitions for redetermination of these orders (Pet. App. 18a).

2. The present collection actions were brought by the United States in the District Court for the District of Puerto Rico, pursuant to Section 105(b)(3) of the Renegotiation Act, 65 Stat. 12, as amended, 50 U.S.C. App. 1215(b)(3). The first action (No. 5951 in the court of appeals) sought to recover the $650,000 due under the unilateral orders for 1952 and 1953, while the other actions (Nos. 5952 and 5953) were on the orders for 1954 and 1955 for an additional $325,000. Petitioner defended on the grounds (1) that the arrangement proceeding under Chapter XI of the Bankruptcy Act has discharged the renegotiation claims and (2) that the Renegotiation Act does not apply to defense subcontracts performed in Puerto Rico by a Puerto Rican corporation.

After trial, the district court entered judgments for the United States in the amounts of the unilateral orders, plus interest (Pet. App. 12a). As to petitioner's first defense, the court found that petitioner "not only failed to mention the claim of the Board in its schedules, but deliberately concealed the bankruptcy proceedings from the Board, despite conferences with officials of the Board during the course of the proceedings" (App., *infra*, p. 13); it further found that

the Board had neither notice of the bankruptcy proceedings nor "the actual knowledge necessary to defeat a creditor's claim" in such proceedings (App., *infra*, p. 14). As to the second defense, the court held that the question of the applicability of the Renegotiation Act to the subcontracts involved was exclusively for the Tax Court and could not be raised in collection actions (App., *infra*, pp. 15–17).

The court of appeals affirmed all three judgments.[6] It found "ample evidentiary basis" for the district court's factual findings that responsible officials of petitioner had "deliberately concealed the arrangement proceeding from the Renegotiation Board" (Pet. App. 21a–22a); it further held that the lower court's findings that the Board did not have notice and that it "did not have knowledge of the arrangement proceeding in time to give it an equal opportunity to participate therein with other creditors" were "not by any means 'clearly erroneous'" (Pet.

[6] Initially, the court affirmed the judgments in Nos. 5952 and 5953 but stayed the judgment in No. 5951 pending a final decision of the Tax Court. However, upon the government's inviting the court's attention to Section 108 of the Act, 65 Stat. 21, as amended, 50 U.S.C. App. 1218 (which permits the stay of a district court collection proceeding "only" if an adequate bond is timely filed in the Tax Court) and to the fact that petitioner had filed neither the prescribed bond in the Tax Court nor a supersedeas bond on appeal (Rule 73(d), Fed. R. Civ. P.), the court reconsidered and entered a new judgment in No. 5951, affirming the judgment of the district court (Pet. App. 7a–8a, 9a–10a). As the court noted (Pet. App. 9a–10a), under Section 108 of the Act, *supra*, any amount collected by the government in excess of that found due by the Tax Court must be refunded with interest.

App. 22a, 23a).[7] The court of appeals also held that the question of the coverage of the Act was exclusively for the Tax Court to determine (Pet. App. 18a–20a; see also Pet. App. 9a–10a).

ARGUMENT

The issues raised by the petitioner involve the application of settled principles of law to the special facts of this case. There is no conflict of decisions.[8] For these reasons, and because the courts below were correct in their resolution of the factual and legal problems presented, review by this Court is not warranted.

1. Petitioner does not challenge the validity of the standards set forth in *Birkett* v. *Columbia Bank*, 195 U.S. 345, for determining what knowledge is timely under the Bankruptcy Act. The Court there stated (195 U.S. at 350):

> Actual knowledge of the proceedings * * * is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends * * *.

[7] The court also ruled that the Board had acted "as promptly as could be expected" and concluded that "[t]he facts do not require a finding of undue delay" on its part (Pet. App. 23a).

[8] Petitioner asserts a "conflict" with several state and federal cases, but each of these, like the present case (as petitioner recognizes, Pet. 15–17), turns on its own facts and involves no difference in legal standards.

Petitioner contends that the factual findings of the courts below, that the Renegotiation Board did not have knowledge of the arrangement proceeding in time to give it an equal opportunity to participate with other creditors, were "clearly erroneous" (Pet. 16). But this Court does not normally "review concurrent findings of fact by two courts below," *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see also, *e.g.*, *The Germanic*, 196 U.S. 589; *Great Atlantic & Pac. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147.

In any event, as the record establishes, the Board's knowledge came over two months after the Chapter XI proceedings were initiated, after the appointment of a receiver and of a creditors' committee, and after several creditors' meetings had been held at which important decisions were made; and the Board had no knowledge or notice of the all-important final meeting of the creditors on November 9 or of the judicial confirmation of the plan on November 13. Accordingly, there can be no real doubt that the concurrent factual findings of lack of sufficient notice or actual knowledge are fully supported by the evidence (see Supp. R. 242–251, 145–147; R. 62–63, 85).[9]

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[9] Petitioner's suggestion that notice of the Chapter XI proceedings to the Navy in connection with a $12,000 claim against an affiliate of petitioner (Pet. 18; see notes 4, 5, *supra*, pp. 4, 6) was sufficient notice to the Renegotiation Board with respect to the $975,000 in claims against petitioner was properly rejected by the courts below (see Pet. App. 21a, n. 2). Under neither the Bankruptcy Act (52 Stat. 867, as amended, 11 U.S.C. 94(e); 52 Stat. 905, 11 U.S.C. 702) nor the settled case law is notice or knowledge on the part of one government agency imputable to another agency. See, *e.g.*, *United States* v. *Yale Transport*

2. The courts below were also correct in rejecting petitioner's contention that the issue of the applicability of the Renegotiation Act to its subcontracts could be raised as a defense to this collection proceeding. Section 108 of the Renegotiation Act, which gives the Tax Court "exclusive jurisdiction" to determine the amount of excessive profits, makes that court the sole initial forum[10] for the resolution of all questions of fact or law involved in that determination, including the question of the applicability or coverage of the Act. 65 Stat. 21, as amended, 50 U.S.C. App. 1218; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 545. Since in one of the cases in the court below (No. 5951), petitioner initiated Tax Court proceedings but has not completed them, it has failed to exhaust its remedies.[11] *Macauley* v. *Waterman S.S. Corp.*, *supra*, 327 U.S. at 544–545; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767. In the other two cases in the court below (Nos. 5952 and 5953) petitioner failed to institute Tax Court proceedings, and it cannot raise here questions of coverage which should be

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Corp., 184 F. Supp. 42 (S.D. N.Y.); *United States* v. *DePew*, 100 F. 2d 725 (C.A. 10); *United States* v. *Riggins*, 65 F. 2d 750 (C.A. 9).

[10] Once the issue of applicability or coverage has been resolved in the Tax Court, an appeal may lie on that issue to the appropriate court of appeals. See *United States* v. *California Eastern Line*, 348 U.S. 351; see also 70 Stat. 791, 50 U.S.C. App. 1218a.

[11] As we have noted (see note 6, *supra*, p. 8), to the extent the Tax Court reduces or eliminates amounts due on the claims against petitioner, the government will have to refund the amounts collected in the instant proceeding with interest.

presented to that court. *Lichter* v. *United States*, 334 U.S. 742, 791–793.[12]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

DECEMBER 1962

[12] At any rate, the Renegotiation Act does apply to the defense subcontracts involved in this case. It expressly applies to all contracts and related subcontracts with defense agencies of the government, Section 102(a), 65 Stat. 8, as amended, 50 U.S.C. App. 1212(a), and contains no geographical or territorial limitations, except that the Board is authorized in its discretion to exempt from the Act contracts or subcontracts to be performed outside the territorial limits of the continental United States or Alaska. Section 106(d), 65 Stat. 17, as amended, 50 U.S.C. App. 1216(d). The Board has exempted only contracts with foreign nationals or corporations where both performance and delivery occur outside of the United States, its territories or possessions. 32 C.F.R. 1455.2(b). Since petitioner was incorporated in Puerto Rico (not a foreign country) and was owned and controlled by American citizens, it is clearly not "foreign" within the meaning of the regulation. And since its contracts were performed in Puerto Rico and deliveries were made to manufacturers on the mainland of the United States (R. 66), neither performance nor delivery occurred "outside the United States, its territories and possessions."

APPENDIX

Order Denying Motion to Dismiss

These consolidated cases were submitted on defendant's motion to dismiss, made at the trial of the action, with respect to Civil No. 167–57 and on plaintiff's motions for summary judgment and defendant's cross motions for summary judgment in Nos. Civil 359–59 and 80–60.

I am satisfied that the Renegotiation Board, an agency of the United States, did not have actual knowledge of the proceedings in bankruptcy, that the defendant indeed, not only failed to mention the claim of the Board in its schedules, but deliberately concealed the bankruptcy proceedings from the Board, despite conferences with officials of the Board during the course of the proceedings; and that the provisions of Title 11 U.S.C.A., Sec. 94(e), relating to notice of the first meeting of creditors to the particular government agency involved were not complied with. Therefore, the unscheduled renegotiation claims of the United States were not discharged by defendant's Chapter XI Proceedings. The motion to dismiss in Civil No. 167–57 is therefore denied.

With respect to Civil Nos. 80–60 and 359–59, consolidated with 167–57, and also 167–57, defendant is granted a period of ten days within which to file its brief on the jurisdictional question argued at the trial, and the plaintiff is granted a period of ten days from the date of its notice of defendant's brief within which to reply. Decision on plaintiff's motions for summary judgment and defendant's cross motions for

summary judgment will be held in abeyance until the jurisdictional question is decided.

San Juan, Puerto Rico, June 13, 1961.

(Signed) CLEMENTE RUIZ-NAZARIO,
United States District Judge.

MEMORANDUM—CIVIL NOS. 167–57, 359–59, 80–60

I

Defendant in No. 167–57 Civil has moved the Court to reconsider its order of June 13, 1961, denying defendant's motion to dismiss.

There is no doubt in my mind that the *Renegotiation Board,* as distinguished from other departments or agencies of the government, received no notice of the first meeting of creditors as required by Title 11, U.S.C.A., Sec. 94(e). As for actual knowledge of the bankruptcy proceedings, the record here does not meet the criterion of *Birkett* v. *Columbia Bank,* 195 U.S. 345, wherein the actual knowledge necessary to defeat a creditor's claim is stated as follows at page 350:

> "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."

The motion for reconsideration must therefore be and hereby is denied.

II

JURISDICTIONAL QUESTION

Defendant has raised a very interesting question bottomed on the alleged inapplicability of the Renegotiation Act of 1951 to its Puerto Rican contracts. A novel construction of Section 9 of the Puerto Rican Federal Relations Act, Title 48 U.S.C., Sec. 734, whereby general Federal Statutory law would apply to the Commonwealth of Puerto Rico only as it stood prior to, and existed as of, July 3, 1950, unless specifically extended to the Commonwealth by Act of Congress, is proposed and ably expounded in both the historical and the jurisprudential aspects.

I am, however, precluded from any consideration of this question in this case as the Renegotiation Act of 1951, as amended, 50 U.S.C. App. 1218, places final determination of amounts, if any, of excessive profits in the hands of the Tax Court.* A decision as to what is a negotiable contract necessarily involves a decision as to coverage, in this case whether defendant's Puerto Rican contracts were covered by the Renegotiation Act. In *Macauley* v. *Waterman SS Corp.*, 327 U.S. 540, the court stated as follows:

> Just as in the Myers case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the Myers case, empowers administrative bodies to rule on the question of

*"Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Title 50 U.S.C.A., App., Sec. 1218.

coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403 (c) (1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * *". Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here just as in the Myers case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act (at pp. 544 and 545).

This Court is therefore without jurisdiction to consider the applicability of the Renegotiation Act to Puerto Rico or coverage of these contracts.

However the District Courts of the United States have original jurisdiction of civil actions commenced by the United States, 28 U.S.C.A. 1345, and Title 50 App. Sec. 1215, U.S.C.A., authorizes actions on behalf of the United States to recover excessive profits and accrued interest. Therefore as to the collection of the amounts claimed, this Court has jurisdiction.

The motions to dismiss for lack of jurisdiction on Numbers Civil 80–60, 359–59 and 167–57, are denied.

San Juan, Puerto Rico, October 25, 1961.

(signed) CLEMENTE RUIZ-NAZARIO,
United States District Judge.

No.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 5951, 5952 and 5953

HERMETIC SEAL PRODUCTS COMPANY, P. R.,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

Before:

WOODBURY, *Chief Judge*,
HARTIGAN and ALDRICH, *Circuit Judges*.

LOUIS A. TEPPER, with whom STUART F. CARTOON was on briefs, for appellant.

DAVID L. ROSE, Attorney, Department of Justice, with whom WILLIAM H. ORRICK, JR., Assistant Attorney General, FRANCISCO A. GIL, JR., United States Attorney, and JOHN G. LAUGHLIN, Attorney, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT

August 30, 1962

WOODBURY, *Chief Judge*. Three actions under § 105(b)(3) of the Renegotiation Act of 1951, 65 Stat. 14, 50 U. S. C. App. § 1215(b)(3), were brought on behalf of the United States in the United States District Court for the District of Puerto Rico against the appellant, a corporation organized under the laws of Puerto Rico, to recover excess profits on defense subcontracts as determined in three unilateral orders of the Renegotiation Board. In one action recovery is sought for excessive profits determined for the appellant's fiscal years ending on July 31, 1952 and on July 31, 1953; in another, recovery is sought for similar profits determined for its fiscal year ending on July 31, 1954, and in the third like recovery is sought for the year ending on July 31, 1955. In the first action the United States moved for summary judgment and to strike special defenses. The motion for judgment was denied but several defenses were stricken including the defense that the Renegotiation Act of 1951 did not apply in Puerto Rico. The actions were then consolidated and trial was had by the court of the issue whether the renegotiation claims of the United States were barred by failure to assert them in certain arrangement proceedings under Chapter XI of the Bankruptcy Act in the United States District Court for the District of New Jersey involving the appellant and affiliated corporations to be considered in detail presently.

The court below held that it did not have jurisdiction to consider the applicability of the Renegotiation Act to the appellant's business in Puerto Rico and that the claims were not discharged by the arrangement proceedings. It accordingly entered a judgment for the plaintiff in each action in the amount of each unilateral order, that is to say, in the respective amounts of $650,000, $225,000 and $100,000 with interest at [illegible]. The present appeals are from those judgments.

Hermetic Seal Products Company, P. R. Seal Products hereinafter, is one of a group of allied corporations with their principal places of business in Newark, New Jersey. It was organized under the laws of Puerto Rico in 1951 and since that time it has engaged in Puerto Rico in the business of manufacturing and assembling hermetically sealed glass-metal components of electronic equipment such as thermiostats, crystals, relays, condensers, transformers and tubes. It did no business directly with the United States but it sold its products under contracts with firms which in turn sold both to private industry and to the United States.

Since the first case stands on a somewhat different footing from the other two, we shall now describe the cases in order.

Although the Renegotiation Act of 1951, 65 Stat. 7 *et seq.*, in its section 105(e)(1), as it stood at the pertinent times, 50 U. S. C. App. § 1215(e)(1), required contractors to file financial statements with the Renegotiation Board on or before the first day of the fourth calendar month following the close of their fiscal years, the appellant did not file its statement for its fiscal year ending July 31, 1952 until March 1953, or its statement for its fiscal year ending July 31, 1953 until February 1954. The Board commenced formal renegotiation proceedings for those years on May 5, 1953 and July 1, 1954, respectively. One Sidney A. Gutkin, a stockholder of the appellant and its former counsel represented the appellant in those proceedings. In the course of them Gutkin took the position that the Act did not apply to the appellant's contracts because they were performed in Puerto Rico by a Puerto Rican corporation. And he testified that the representative of the New York Regional Renegotiation Board with whom he negotiated agreed with him. The renegotiator to whom the matter was assigned, Mr. Summerfield, however, categorically denied that he had made any such concession, and, indeed, asserted that he had

been advised by higher authority that the Act did apply in Puerto Rico and that he repeatedly so informed Gutkin. Negotiations having come to nothing the appellant and the New York Regional Board entered into an agreement on June 20, 1956, extending the time within which a determination of excessive profits for fiscal 1952 could be made to March 1, 1957. On March 21, 1956, a similar agreement was made extending the time for the determination for fiscal 1953 to July 1, 1957.

On August 8, 1956, the appellant jointly with four New Jersey corporations alleged to constitute a single economic unit because of common stock ownership and because all five corporations had substantially the same officers and the same directors, filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the District of New Jersey. The petition alleged that the corporations had their principal place of business in Newark, that they were unable to pay their debts as they matured and proposed an arrangement for payment of their unsecured creditors. Pursuant to the petition the court immediately appointed a receiver who assumed management of the corporation's affairs with the aid of his counsel and accountant.

During August, September and October creditors' meetings were held which eventually resulted on November 9 in an agreement by the creditors on a plan of arrangement and on November 13, 1956, the District Court held a hearing on the plan and confirmed it.

In the meantime Gutkin, unknown to the referee, had continued to represent the appellant in the renegotiation proceedings being conducted with Summerfield for the Regional Board in New York but he never disclosed that the appellant had filed a petition for an arrangement with its creditors under Chapter XI of the Bankruptcy Act. Nor were the government's renegotiation claims for fiscal 1952 and 1953 listed by the appellant in its Statement of Affairs in the

Chapter XI proceeding or disclosed by anyone on behalf of the appellant to the referee, his accountant or his counsel. Consequently notices of the creditors' meetings etc. were not sent to the Renegotiation Board. However, on October 19, 1956, one Klebanoff, a former officer and principal stockholder of the appellant, who also held some of its largest secured notes, called Mr. Summerfield for information about the renegotiation claim against the appellant and in the course of the conversation told Summerfield that the appellant and its New Jersey affiliates were in a Chapter XI proceeding. Summerfield immediately confirmed that fact by a telephone call to the office of the clerk of the district court which advised him that no date had been set for the filing of proofs of claim. On the same day the Regional Board in New York notified the Board in Washington and it promptly brought the matter to the attention of the Department of Justice which in turn promptly referred the case to the General Accounting Office for preparation of a proof of claim.

In the meantime, without making any further attempt to secure a bilateral agreement for the elimination of excessive profits, the Regional Board on October 23, 1956, issued a unilateral order in the amount of $200,000 for the appellant's 1952 fiscal year and sent notice of the same by mail to the appellant's Puerto Rican address with a carbon copy to its president at his New York office. And, on November 7, 1956, the New York Regional Board issued a unilateral order determining that the appellant had received excessive profits for its fiscal year ending on July 31, 1953 in the amount of $300,000. This order was also mailed to the appellant at its address in Puerto Rico and a copy mailed to one Glickman, a stockholder officer, and secured creditor of the appellant and the one who proposed the plan of arrangement finally approved. Although it was stipulated that these notices of determinations were received by the recipients in the normal course of the mails, they were never

brought to the attention of the receiver or his counsel or mentioned at the formal meeting of creditors held on November 9 at which Glickman's plan of arrangement was approved.

The appellant's 1952 and 1953 cases were transferred by the New York Regional Board to the Board in Washington for review on October 25, and November 2, 1956, respectively, and on November 13 the Board wrote to the Department of Justice and the General Accounting Office requesting the preparation and filing of preliminary and contingent proofs of claim in the Chapter XI proceeding and also requesting that objection be made to any plan of arrangement which did not provide for the claims of the United States arising under the Renegotiation Act of 1951. At this time no employee or member of the Regional Board, or the Board itself or anyone in the Department of Justice had any knowledge or notice of the fact that the creditors' meeting on November 9 had approved a plan of arrangement for the appellant or that the court had confirmed the plan on November 13. Indeed, the Board's letter of November 13 constituted the first information that anyone in the Department of Justice had of any renegotiation proceeding against the appellant or that it was in an arrangement proceeding under Chapter XI. The Department of Justice at once on November 15 instructed the United States Attorney in Newark to take the steps necessary to establish the government's claims for refund of excessive profits for fiscal 1952 and 1953 in the arrangement proceeding and to object to any plan of arrangement which did not make adequate provision for the filing of claims for refunds for those years and similar claims for fiscal 1954 and 1955. But the instructions came too late, for the plan of arrangement had already been adopted by the creditors and confirmed by the court and the United States Attorney in Newark so notified the Department of Justice.

On November 29, 1956, the Renegotiation Board wrote Gutkin and the appellant that it had initiated review of the

New York Regional Board's unilateral determinations of excessive profits for 1952 and 1953 and set a date in December for a conference on the matter. The date of meeting was postponed to January 1957 at Gutkin's request, and he at that time asserted that the appellant's contracts were not subject to renegotiation under the Act. In March the appellant selected new counsel to represent it in the renegotiation proceeding and he for the first time suggested that the government's claims for refund were discharged for failure to present them in the Chapter XI arrangement proceeding. The Board rejected this contention and by unilateral orders on March 25, 1957, determined that the appellant had received excessive profits of $250,000 for its fiscal year ending July 31, 1952 and $400,000 for its fiscal year ending July 31, 1953. It so notified the appellant on March 28, 1957.

The appellant made timely application to the Tax Court of the United States for review of those orders but no determination by that court has been made. It has granted the appellant's motion for a general continuance pending the disposition of this action. So much for the first action.

Although, as we have previously noted, § 105(e)(1) of the Act required contractors to file financial statements with the Board on or before the first day of the fourth calendar month following the close of the contractors' fiscal years, the appellant had not filed such statements for its fiscal years ending July 1, 1954 and July 1, 1955 at the time of the arrangement proceeding beginning in August 1956. Indeed it did not file its statements for those years until February 8, 1958. Thus the Board had no way of ascertaining the presence or absence of renegotiable business of the appellant for those years at the time of the arrangement proceeding. After its statements were filed the Board issued unilateral orders on August 10, 1959 and December 21, 1959 determining that the appellant had received exces-

sive profits of $225,000 in fiscal 1954 and $100,000 in its fiscal 1955 respectively. The appellant did not file petitions for review of these orders in the Tax Court of the United States.

The court below, as we have already noted, struck the defense that the Renegotiation Act of 1951 did not apply to business done in Puerto Rico by a Puerto Rican corporation and consolidated the cases for hearing on the remaining issues tendered by the pleadings. These issues were the statute of limitations, which has not been advanced in this court on appeal, and the defense that the renegotiation claims of the United States were barred by failure to assert them in the Chapter XI arrangement proceeding. After trial the court below found on the testimony of one witness put on the stand by the government and the depositions of Gutkin, Summerfield and others introduced by it, that the renegotiation claims were not barred and gave judgments for the plaintiff in each action in the amount of the respective unilateral determinations. We think the judgments must be affirmed.

The pertinent language of § 108 of the present Renegotiation Act is identical with that of § 403(e) (1) of its predecessor considered by the Court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544 (1946), in which the Court held that the language of the statute gave the Tax Court power to decide questions of the coverage of the Act because "decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits." Then the Court went on to say:

> "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the

> Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case [1] the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act."

It may perhaps be that in the above case the Court was not relying so much upon the exclusive statutory jurisdiction of the Tax Court as upon the doctrine of exhaustion of administrative remedies. But however that may be, *Lichter* v. *United States*, 334 U. S. 742, 792 (1948), makes it clear that a contractor who does not resort to the Tax Court cannot question the coverage of the Act elsewhere, for in that case in an action like the one at bar the Court held that contractors ". . . do not have the right to present questions as to the coverage of that Act, as to the amount of excessive profits adjudged to be due from them or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition to that court for a redetermination of excessive profits, if any." The question of coverage, therefore, can not be raised at all in the second and third actions. In the first action, however, a different situation obtains, for it covers excess profits for the fiscal years 1952 and 1953 as to which the appellant sought review in the Tax Court where the issue of coverage is still pending.

In this situation the court below in the first action, had it been asked, might well have followed the approach taken in *General American Tank Car Corp.* v. *El Dorado Termi-*

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[1] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

nal Co., 308 U. S. 422 (1940), and stayed its hand pending final determination of the question of coverage, for the validity of its judgment in that action hinges upon the answer to that question. If the Act does not apply to Puerto Rican business done by a Puerto Rican corporation the action should be dismissed. But if it does apply the judgment therein should be affirmed as will presently appear. We shall direct that the judgment in the first action be held in abeyance pending final decision of the question of coverage and proceed to consideration of the other issue in the cases.

In its order denying the appellant's motion to dismiss the actions the court said:

> "I am satisfied that the Renegotiation Board, an agency of the United States, did not have actual knowledge of the proceedings in bankruptcy, that the defendant indeed, not only failed to mention the claim of the Board in its schedules, but deliberately concealed the bankruptcy proceedings from the Board, despite conferences with officials of the Board during the course of the proceedings; and that the provisions of Title 11 U. S. C. A., Sec. 94(e), relating to notice of the first meeting of creditors to the particular government agency involved were not complied with. Therefore, the unscheduled renegotiation claims of the United States were not discharged by defendant's Chapter XI Proceedings."

And in a subsequent memorandum denying the appellant's motion for reconsideration the court added, 198 F. Supp. 749, 750:

> "There is no doubt in my mind that the *Renegotiation Board*, as distinguished from other departments or agencies of the government, received no notice of the first meeting of creditors as required by Title 11, U. S. C. A., Sec. 94(e). As for actual knowledge of the

> bankruptcy proceedings, the record here does not meet the criterion of *Bickett* v. *Columbia Bank*, 195 U. S. 345, ..."

Certainly the appellant's officers knew that there were renegotiation claims of the United States pending when they initialed the arrangement proceeding. And § 58 of Chapter VI of the Bankruptcy Act, 11 U. S. C. § 94 (c) provides:

> "Whenever the schedules of the bankrupt, or the list of creditors of the bankrupt, or any other papers filed in the case disclose a debt to the United States acting through any department, agency, or instrumentality thereof . . . , a notice of the first meeting shall be mailed as well to the head of such department, agency, or instrumentality."

Although this section literally applies only to scheduled or listed debts and imposes a duty on the bankruptcy court rather than upon the bankrupt, we do not read it so narrowly as to permit a bankrupt to escape its requirement of notice by deliberately failing to schedule or list a debt to the United States. *Cf.*, *United States* v. *Goldenbaum*, 175 F. Supp. 415 (N. D. Ohio, 1959). The thrust of the statute is not to be so easily avoided. And the Renegotiation Board is the particular governmental agency or instrumentality primarily concerned. Yet there is no suggestion that the appellant ever gave the Renegotiation Board any notice of any kind of the arrangement proceeding in which it was involved.[2] Indeed our rather detailed statement of facts as drawn from the stipulation of the parties, the testimony of the one witness who took the stand and the depositions submitted shows that there is ample evidentiary basis for

[2] The fact that the Department of the Navy had notice of a wholly separate renegotiation claim against one of the other corporations involved in the arrangement proceeding is quite beside the point.

the court's finding that the appellant's responsible officials deliberately concealed the arrangement proceeding from the Renegotiation Board. The court's findings of lack of notice and in fact of deliberate concealment are certainly not "clearly erroneous."

Nor did the court below err in its rulings of law.

Section 367 of Chapter 11 of the Bankruptcy Act, XI U. S. C. § 767, provides in material part that ". . . the arrangement and its provisions shall be binding on the debtor, . . . and upon all creditors of the debtor, whether or not they have been affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable; . . . ." But this provision is qualified by § 371 of Chapter XI, 11 U. S. C. § 771 which provides: "The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement . . . but excluding such debts as, under section 35 of this title, are not dischargeable." And § 17 of Chapter III of the Bankruptcy Act, 11 U. S. C. § 35 provides, with emphasis supplied: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;* . . . ."

This statutory provision is not new. It was considered years ago in *Birkett v. Columbia Bank*, 195 U. S. 345, 350 (1904), and the relevant rule under it established as follows:

> "Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."

This rule has been consistently applied over the years as many cases which might be cited abundantly testify. The critical question, therefore, is whether the United States through the Renegotiation Board had knowledge of the arrangement proceeding in time to afford it an equal opportunity to participate in that proceeding with other creditors. This is the legal test applied by the court below. The question is whether it applied the test correctly to the facts. We hold that it did.

The question of actual timely knowledge of bankruptcy proceedings is clearly one of fact, and the parties agree that the first actual knowledge the Renegotiation Board received of the arrangement proceedings came on October 19, 1956, over two months after that proceeding was initiated and during which time several important creditors' meetings had been held,[3] and only about three weeks before the arrangement was confirmed. And once the Board had knowledge it acted as promptly as could be expected of a large governmental agency. The facts do not require a finding of undue delay. It will suffice to say that our statement of the facts shows that the court's ultimate operative finding that the Board as the governmental agency primarily concerned did not have knowledge of the arrangement proceeding in time to give it an equal opportunity to participate therein with other creditors is not by any means "clearly erroneous."

Judgment will be entered in No. 5951 staying the judgment of the District Court until final determination of the question of the coverage of the Renegotiation Act of 1951, as amended.

Judgment will be entered in Nos. 5952 and 5953 affirming the judgments of the District Court.

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[3] Five creditors' meetings were held at which a committee was chosen, continuation of the business voted and plans discussed.